Supreme Court, U.S.
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No. 96-1324

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARINA ZARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the amendment made by Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, requiring prisoners to obtain a certificate of appealability before they may appeal from a district court's denial of a motion under 28 U.S.C. 2255, applies to cases in which the motion was filed before the effective date of the Act, but the notice of appeal was filed after the effective date of the Act.

2. Whether the court of appeals correctly denied a certificate of appealability to petitioner.

3. Whether the certificate-of-appealability provisions are constitutional as applied to petitioner.

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OPINION BELOW

The judgment orders of the court of appeals (Pet. App. 7, 13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1996. Pet. App. 7. A motion for reconsideration was denied on November 22, 1996. Pet. App. 13. The petition for a writ of certiorari was filed on February 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] The petition for a writ of certiorari was filed more than 90 days after the denial of petitioner's motion for a certificate of appealability, but less than 90 days after the denial of her motion for reconsideration in the court of appeals. See Rule 13.3 of the Rules of this Court.

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on one count of conspiring to manufacture and to distribute methamphetamine, in violation of 21 U.S.C. 846. She was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. See 21 U.S.C. 841(b)(1)(A)(viii). The court of appeals affirmed, and this Court denied certiorari. *United States* v. *Zarnes*, 33 F.3d 1454 (7th Cir. 1994), cert. denied, 115 S. Ct. 2286 (1995). Petitioner then filed a motion to vacate her conviction and sentence under 28 U.S.C. 2255. The district court denied the motion. The court of appeals denied a certificate of appealability and dismissed the appeal.

1. Petitioner was a member of a large-scale methamphetamine conspiracy operating in California and Illinois. As the court of appeals explained in rejecting petitioner's challenge to the sufficiency of the evidence on direct appeal, she "played a crucial role in the early stages of the conspiracy as the * * * dependable supplier of methamphetamine." 33 F.3d at 1465. After an initial sale of methamphetamine in 1987, petitioner and her co-conspirators "set about to standardize their future dealings with one another" and engaged in several additional transactions and telephone conversations during 1988. *Ibid.* Tape-recorded conversations "indicated that the relationship between [petitioner] and [her co-conspirators] was a cooperative and mutually beneficial one." *Id.* at 1466.

2. On April 4, 1996, petitioner filed a motion to vacate her conviction and sentence under 28 U.S.C. 2255 (1994). Pet. App. 24-34. She raised six grounds

for relief, including claims that her counsel did not provide effective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984); that her conviction violated the Double Jeopardy Clause; that the evidence was insufficient to support the jury's verdict; that the district court miscalculated the purity of the methamphetamine involved in the case; that the court improperly departed upward from the sentencing range established by the Sentencing Guidelines (although the court did not in fact depart); and that the court misapplied the "relevant conduct" principles of Guidelines § 1B1.3. See Pet. App. 15 & n.1.

On May 28, 1996, the district court filed its order denying petitioner's motion. The court rejected her double jeopardy and sufficiency-of-the-evidence claims on the ground that the court of appeals had already reviewed and rejected those claims on direct appeal. As petitioner had not raised her sentencing claims on direct appeal, however, the court held that she could not raise them on collateral review without a showing of "cause and prejudice" for the procedural default. Pet. App. 16 (citing *United States* v. *Frady*, 456 U.S. 152, 166 (1982)). Construing petitioner's *Strickland* claim both "as an assertion of cause for failure to raise [the sentencing] issues on appeal," *ibid.*, and as an independent claim of error, the court concluded that no relief was warranted because petitioner "has not shown that any of her attorney's alleged errors caused any prejudice," *id.* at 21. The court explained that it had found petitioner responsible for more than 100 grams of pure methamphetamine, which triggered the ten-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A)(viii), based on a finding that petitioner was responsible for a gross amount of 907.2 grams of methamphetamine. Pet. App. 18 & n.2.

The court explained that "[t]herefore, [petitioner's] attorney could have done nothing to reduce the sentence she received." *Id.* at 19. Petitioner filed a notice of appeal on June 11, 1996. District Court Case No. 89-30070, Docket No. 688.

3. On April 24, 1996, while petitioner's motion was pending in the district court, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, into law. Title I of the Act made changes to the law governing motions for collateral relief for federal prisoners under 28 U.S.C. 2255. The amendments made by Section 102 of the Act to 28 U.S.C. 2253 require a "certificate of appealability" before a prisoner may appeal from a district court's denial of his motion. The new provision states that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under section 2255." 110 Stat. 1217 (to be codified at 28 U.S.C. 2253(c)(1)(B)).[2]

4. On July 3, 1996, the district court denied petitioner a certificate of appealability. District Court Case No. 89-30070, Docket No. 690. On September 30, 1996, the court of appeals denied petitioner a certificate of appealability and dismissed her appeal. Pet. App. 7. A motion for reconsideration was denied by the court of appeals on November 22, 1996. *Id.* at 13.

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[2] A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). The certificate must "indicate which specific issue or issues satisfy the showing required." *Ibid.* (to be codified at 28 U.S.C. 2253(c)(3)).

ARGUMENT

1. a. Petitioner contends (Pet. 15-17) that the new statutory requirement that she must obtain a certificate of appealability before appealing the denial of her Section 2255 motion does not apply in this case, because her Section 2255 motion was pending in the district court—but not on appeal—at the time that statutory requirement was enacted. That claim is without merit.

In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), this Court addressed the circumstances under which "a federal statute enacted after the events in a suit" may be applied to a pending case. *Id.* at 280. Under *Landgraf*, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Ibid.* When Congress issues a clear statement regarding the statute's applicability to pending cases, that statement controls. *Ibid.* "When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.* If a statute that lacks a clear statement would operate retroactively, it may not be applied retroactively.[3]

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[3] "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf*, 511 U.S. at 269. "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-270. That question may be answered by considering "the nature and extent of the change in the law and the degree of

Under the *Landgraf* analysis, however, procedural rules are generally not "retroactive," even if applied to lawsuits involving conduct that was completed before the rule was promulgated. 511 U.S. at 275. Because procedural rules regulate conduct in litigation, rather than primary conduct of the parties outside the litigation context, litigants have "diminished reliance interests in matters of procedure." *Ibid.* Thus, "the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Ibid.*

For example, in *Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969), this Court held that "an agency circular requiring a local housing authority to give notice of reasons and opportunity to respond before evicting a tenant was applicable to an eviction proceeding commenced before the regulation issued" because the new hearing procedures did not affect either party's primary conduct, that is, their "obligations under the lease agreement." *Landgraf*, 511 U.S. at 276. Similarly, in *Bradley* v. *School Board*, 416 U.S. 696 (1974), this Court held that the newly enacted Section 718 of the Education Amendments of 1972, 20 U.S.C. 1671 (1976), which authorized federal courts to award reasonable attorney's fees to prevailing parties, would apply to a case pending on appeal because the attorney's fee determination was "collateral to the main cause of action" and "uniquely

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connection between the operation of the new rule and a relevant past event." *Id.* at 270.

separable from the cause of action to be proved at trial." *Landgraf*, 511 U.S. at 276-277.[4]

Section 102 of the AEDPA is a procedural change that does not violate any "vested right" under *Landgraf*. It does not define a new crime or otherwise change the significance of the prisoner's primary conduct. Nor does it change the constitutional standards governing the procedures used at the prisoner's

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[4] As this Court warned in *Landgraf*, however, "the mere fact that a new rule is procedural does not mean that it applies to every pending case." 511 U.S. at 275 n.29. Because procedural rules regulate litigation conduct, it is the time of the litigation conduct, and not the time of the primary conduct underlying the litigation, that matters for purposes of retroactivity. Therefore, retroactivity analysis of procedural rules depends "on the posture of the particular case." *Ibid.* It is our position that 28 U.S.C. 2253(c)(1)(B) does not apply in cases where the notice of appeal was filed before the effective date of the Act. That position is in accord with the published decisions of the courts of appeals that have considered the issue. See *United States* v. *Rocha*, No. 95-11229, 1997 WL 123580, at *2-*3 (5th Cir. Apr. 3, 1997) (concluding that the amended Section 2253(c) should not be applied to a Section 2255 appeal filed before the Act's effective date); *United States* v. *Lopez*, 100 F.3d 113, 116-117 (10th Cir. 1996) (same); *United States* v. *Ruth*, 100 F.3d 111, 112 n.1 (10th Cir. 1996) (same); *Herrera* v. *United States*, 96 F.3d 1010, 1011-1012 (7th Cir. 1996) (same); *Thye* v. *United States*, 96 F.3d 635, 636-637 (2d Cir. 1996) (concluding that the amended Section 2253(c) should not be applied to a Section 2255 appeal filed and briefed before the Act's effective date); compare *Naddi* v. *Hill*, 106 F.3d 275, 277 (9th Cir. 1997) (concluding that the certificate-of-appealability requirement does not apply if a habeas corpus petition by a state prisoner is filed in district court before the effective date of the Act, even if the notice of appeal is filed after that date). See also *Lozada* v. *United States*, No. 96-2887, 1997 WL 99719, at *3 n.2 (2d Cir. Mar. 7, 1997) (to be reported at 107 F.3d 1011).

trial and sentencing. Indeed, Section 102 does not even restrict the scope of relief available under Section 2255; it merely controls the availability of appellate review. Retroactivity analysis is thus controlled by the posture of the particular case at the time the legislation went into effect.

The relevant event under Section 102 is the filing of a notice of appeal. The district court in this case denied collateral relief to petitioner on May 28, 1996—one month after the amended Section 2253 was signed into law. Petitioner filed her notice of appeal on June 11, 1996. Therefore, the posture of petitioner's case rendered her appeal from the district court's final order subject to the Act, even though her Section 2255 motion was filed before the effective date of the Act. See *Lozada* v. *United States*, No. 96-2887, 1997 WL 99719, at *2-*3 (2d Cir. Mar. 7, 1997) (to be reported at 107 F.3d 1011) (applying certificate-of-appealability requirement where Section 2255 movant's notice of appeal was filed after the effective date of the Act); *United States* v. *Riddick*, 104 F.3d 1239, 1240-1241 (10th Cir. 1997) (same); *United States* v. *Orozco*, 103 F.3d 389, 391-392 (5th Cir. 1996) (same); *Hunter* v. *United States*, 101 F.3d 1565, 1573 (11th Cir. 1996) (en banc) (same), petition for cert. pending, No. 96-1443 (filed Mar. 10, 1997); see also *United States* v. *Coyle*, 944 F. Supp. 418, 419-420 (E.D. Pa. 1996); *United States* v. *Cota-Loaiza*, 936 F. Supp. 756, 758-759 (D. Colo. 1996).[5]

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[5] This Court has denied certiorari in two cases in which courts of appeals applied the new certificate-of-appealability requirement to cases that were pending in the district court on the effective date of the Act, but in which the prisoner's notice of appeal was not filed until after that date. See *England* v. *United States*, cert. denied, 117 S. Ct. 969 (1997);

b. Petitioner argues (Pet. 16) that the courts of appeals are divided on the question presented in this case. In particular, she cites *Jeffries* v. *Wood*, 103 F.3d 827 (1996) (en banc order), in which the Ninth Circuit held in a brief order that the amendments made by Title I of the Act, which include the certificate-of-appealability provisions at issue here, do not apply to "cases filed" before the Act's effective date. The order in *Jeffries* did not elucidate how that rule would apply in this case, *i.e.*, whether the relevant date for purposes of the certificate-of-appealability requirement is the date the Section 2255 motion was filed in the district court or the date the prisoner's appeal from the denial of a Section 2255 motion was filed in the court of appeals. In *Naddi* v. *Hill*, 106 F.3d 275 (1997), the Ninth Circuit held that, under *Jeffries*, the certificate-of-appealability requirement does not apply to an appeal by a state prisoner whose habeas corpus petition was filed in district court before the effective date of the Act, even though his notice of appeal was filed after that date. Thus, it appears that in cases involving state prisoners, the Ninth Circuit has departed from the majority rule. The decision in *Naddi*, however, did not involve the application of

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Travis v. *United States*, cert. denied, 117 S. Ct. 968 (1997). We have also filed a brief in opposition to certiorari in *Durham* v. *United States*, No. 96-7329, a case in the same posture that is now pending before the Court. In *Embrey* v. *United States*, No. 96-7325, the prisoner's notice of appeal was filed before the effective date of the Act, but the court of appeals nonetheless applied the certificate-of-appealability requirement and dismissed the appeal. In our brief in opposition to certiorari in *Embrey*, we stated our position that the court of appeals erred in that respect.

the certificate-of-appealability requirement to federal prisoners in petitioner's position, *i.e.*, those who filed their Section 2255 motions before the Act's effective date but who filed their notices of appeal after that date. Moreover, in *Naddi*, the district court had certified the requested issues for appeal, such that the question whether the certificate-of-appealability requirement applied had no effect on the outcome. The Seventh Circuit's decision in this case thus does not squarely conflict either with *Jeffries* or with *Naddi*.[6]

Even if a square conflict developed, however, it is not clear that the issue would warrant resolution by this Court. At present, the conflict would affect a defined set of Section 2255 cases—*i.e.*, those that were pending in the district courts, but not on appeal,

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[6] The other cases cited by petitioner do not support her claim of a conflict in the circuits. In *United States* v. *Lopez*, *supra*, the court merely held that the certificate-of-appealability provisions do not apply where the notice of appeal was filed *before* the Act's effective date; the decision has no bearing on cases, such as this one, in which the notice of appeal was filed *after* the Act's effective date. See *Riddick*, 104 F.3d at 1240-1241.

In *Boria* v. *Keane*, 90 F.3d 36 (1996), petition for cert. pending, No. 96-628 (filed Oct. 11, 1996), the Second Circuit considered only the retroactivity of the new deference provisions of the Act, § 104(3), 110 Stat. 1218 (to be codified at 28 U.S.C. 2254(d)). The retroactivity of those provisions is now pending before this Court in *Lindh* v. *Murphy*, No. 96-6298 (argued Apr. 14, 1997). See discussion at pages 12-14, *infra*. The Second Circuit has adhered to the majority view that the certificate-of-appealability provisions apply to cases in which the notice of appeal was filed after the Act's effective date. Compare *Thye*, 96 F.3d at 636-637, with *Lozada*, 1997 WL 99719, at *3 & n.2. See note 4, *supra*.

on the effective date of the Act. Even with respect to those cases, applying the certificate-of-appealability requirement will ordinarily, as here, have no effect on the outcome of cases involving constitutional claims.[7] By denying petitioner a certificate of appealability, the court of appeals determined that she had not made even "a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). Because it is easier to make that showing than it is to prevail on the merits of a constitutional claim, the court of appeals' decision carries with it, *a fortiori*, a rejection of petitioner's claims on their merits. Cf. *United States* v. *Rocha*, No. 95-11229, 1997 WL 123580, at *2 n.2 (5th Cir. Apr. 3, 1997) ("[T]he showing for obtaining a [certificate of appealability] is lower than that required to prevail on the merits."). As

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[7] Petitioner raised three non-constitutional claims concerning her sentencing. A certificate of appealability may not be issued based on a non-constitutional claim. See *Lozada*, 1997 WL 99719, at *2; *United States* v. *Apker*, 101 F.3d 75 (8th Cir. 1996); *Hohn* v. *United States*, 99 F.3d 892 (8th Cir. 1996). As the district court correctly determined (Pet. App. 16), however, petitioner's procedural default of her non-constitutional claims on direct review means that she could not raise them on collateral review absent a showing of cause and prejudice. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Petitioner's asserted "cause" in this case is her claim of ineffective assistance of counsel under *Strickland*, a purely constitutional claim that was also asserted as an independent ground for relief. See Pet. App. 16. Thus, by denying a certificate of appealability with respect to petitioner's *Strickland* claim, the court of appeals determined that her statutory sentencing claims were inexcusably defaulted and could not entitle her to collateral relief. In any event, in this Court petitioner advances only her *Strickland* claim. See Pet. 9-12.

petitioner therefore could not have succeeded on appeal in any event. Further review in this case is not warranted.

c. In *Lindh* v. *Murphy*, No. 96-6298 (argued Apr. 14, 1997), the Court granted certiorari limited to the question whether amendments to 28 U.S.C. 2254(d) that were made by the Act apply to pending habeas cases. Those amendments establish new requirements before a court may grant habeas relief to state prisoners. This case need not be held pending the Court's decision in *Lindh*, because the outcome of *Lindh* is unlikely to affect the disposition of this case.

The petitioner in *Lindh* presents two primary arguments in support of his claim that the new standards for state prisoner habeas relief do not apply to pending cases. The petitioner in *Lindh* argues that the Act itself provides that the amendments to the existing federal statutes governing collateral review of convictions should not apply to pending cases. The petitioner in *Lindh* also argues that even if the Act did not so provide, application of the *Landgraf* analysis to the Act's new standards for granting habeas relief to state prisoners leads to the conclusion that those new standards do not apply to pending cases. Even if the Court were to accept one or both of those arguments in *Lindh*, however, the result in this case would remain unaffected.

First, the petitioner in *Lindh* notes that Section 107(c) of the Act provides that "*Chapter 154* of title 28, United States Code * * * shall apply to cases pending on or after the date of enactment of this Act." 110 Stat. 1226 (emphasis added). He argues that the Act's statement that its provisions codified in *Chapter 154* of Title 28 "shall apply to cases pending" implies that its provisions codified in *Chapter 153* of

Title 28 should not apply to pending cases. Both the provision at issue in *Lindh* altering the bases for granting habeas relief for state prisoners and the provision at issue here requiring a certificate of appealability for federal prisoners are amendments to Chapter 153 of Title 28 and therefore, under the *Lindh* petitioner's argument, would not apply to pending cases. See generally 96-6298 Pet. Br. 24-40.

Even if the petitioner in *Lindh* is correct, that would not affect the analysis of this case. At most, the *Lindh* petitioner's argument regarding Section 107(c) of the Act would mean that Congress intended the certificate-of-appealability requirement, like the other amendments to provisions of Chapter 153, not to apply to "cases pending" on April 24, 1996. Because the certificate-of-appealability requirement imposes a condition on the filing of a case in the court of appeals, petitioner's argument would therefore show—at most—that that requirement does not apply to "cases pending" in the court of appeals on April 24, 1996. This case was pending in the district court—not in the court of appeals—on that date. Accordingly, this case would be unaffected by adoption of the *Lindh* petitioner's argument regarding Section 107(c). Indeed, if the *Lindh* petitioner's argument were accepted, it would draw precisely the same line that we propose regarding the application of the certificate-of-appealability requirement: that requirement would apply to cases filed in the court of appeals on or after April 24, 1996, but not to "cases pending" in the court of appeals before that date.

Second, the petitioner in *Lindh* argues that even if the Act itself contained no section regarding the application of its various provisions to pending cases, analysis under *Landgraf* yields the conclusion that

the new standards governing habeas relief for state prisoners do not apply to pending cases. See 96-6298 Pet. Br. 40-66. Acceptance of that argument, however, would also have no effect on this case. Unlike the provision at issue in *Lindh*, which alters the requirements for granting habeas relief to state prisoners, the certificate-of-appealability provision at issue in this case does not govern the circumstances under which a conviction may be collaterally attacked. Instead, the certificate-of-appealability provision governs the availability of a particular procedure—appellate review—to correct an error that a district court may have made in ruling on a Section 2255 motion. Therefore, regardless of the Court's conclusion about the proper treatment of the provision at issue in *Lindh*, the certificate-of-appealability requirement is clearly a new "procedural" rule under *Landgraf* and, as we argue above, it is applicable to cases that were already filed in the district court—but not in the court of appeals—on the effective date of the Act.

2. Petitioner argues (Pet. 9-12) that the court of appeals erred in refusing to issue a certificate of appealability in her case. A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). The court of appeals correctly found that petitioner failed to make such a showing in this case. In any event, further review would not be warranted to determine whether the court of appeals applied the statutory standard correctly to the particular facts of this case.

Petitioner asserts (Pet. 10-11) that the court of appeals should have granted a certificate of appeal-

ability with respect to the claim that her attorney was ineffective for failing to object to the "purity" of the methamphetamine involved in this case. The district court noted that its finding that petitioner's sentence should be based on her responsibility for more than 100 grams of pure methamphetamine—the amount required to trigger the mandatory minimum sentence provisions of 21 U.S.C. 841(b)(1)(A)(viii)—was based on the finding in the presentence report that petitioner was responsible for a gross amount of more than 907 grams of methamphetamine, coupled with "trial testimony regarding the purity of the methamphetamine." Pet. App. 18 n.2. Petitioner's *Strickland* claim was thus properly denied because no prejudice could have resulted from her attorney's failure to challenge the purity of the methamphetamine. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984).

3. Petitioner contends (Pet. 12-14) that the certificate-of-appealability provisions are unconstitutional because they "appear[] to take away any opportunity for appellate review."[8] The Act expressly permits appeal, however, if the prisoner can make a "substantial showing" of the denial of a constitutional right. AEDPA § 102, 110 Stat. 1217-1218 (to be codified at 28 U.S.C. 2253(c)(2)). Every court of

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[8] Petitioner also alleges that the new time-limit provisions, added to Section 2255 by Section 105 of the Act, 110 Stat. 1220, are unconstitutional. That claim is not properly before this Court, as no court has suggested that petitioner's Section 2255 motion was untimely. See *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) (one-year time limit provisions of 28 U.S.C. 2244(d) and 2255 apply only to collateral attacks filed more than one year after effective date of the Act), cert. granted, 117 S. Ct. 726 (1997) (No. 96-6298).

appeals to consider the issue has held that the "substantial showing" requirement in Section 2253(c)(2) is identical to the showing that state prisoners had to make under former Section 2253 in order to appeal from an adverse district court decision on a habeas petition. See, *e.g.*, *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir. 1997), petition for cert. pending, No. 96-1461 (filed Mar. 14, 1997); *Drinkard* v. *Johnson*, 97 F.3d 751, 755-756 (5th Cir. 1996), cert. denied, 117 S. Ct. 1114 (1997); *Herrera* v. *United States*, 96 F.3d 1010, 1012 (7th Cir. 1996). Cf. *Greenawalt* v. *Stewart*, 105 F.3d 1268, 1272-1273 (9th Cir.), cert. denied, 117 S. Ct. 794 (1997); *Lowell* v. *Prunty*, 91 F.3d 1358, 1359 (9th Cir. 1996), cert. denied, No. 96-7665 (Mar. 31, 1997); *Williams* v. *Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). This Court's decision in *Barefoot* v. *Estelle*, 463 U.S. 880, 887-888, 892-893 (1983), which approved the certificate-of-probable-cause provisions of former Section 2253, makes clear that such a requirement is constitutional. Indeed, the Constitution does not require that appeal be made available on direct review, much less on collateral review.[9] See *Goeke* v. *Branch*, 514 U.S. 115, 120 (1995) (per curiam); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Ross* v. *Moffitt*, 417 U.S. 600, 611 (1974); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894).

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[9] The new certificate-of-appealability requirement differs from the certificate-of-probable-cause requirement under prior law in that the new provision requires a substantial showing as to particular issues, not the entire application for collateral review. But petitioner does not suggest that there is any constitutional significance to that change. Moreover, as noted above, the denial of a certificate on a constitutional claim demonstrates that the prisoner would not be able to prevail on appeal in any event.

Accordingly, petitioner's constitutional challenge is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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